



REPUBLIC OF KENYA



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**Wambua v Republic (Criminal Appeal E067 of 2023)
[2026] KEHC 1650 (KLR) (12 February 2026) (Judgment)**

Neutral citation: [2026] KEHC 1650 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
CRIMINAL APPEAL E067 OF 2023
RC RUTTO, J
FEBRUARY 12, 2026**

BETWEEN

FRANCIS MUSYOKI WAMBUA APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal from the Judgment of Hon. M.A Otindo (PM) at Machakos Chief Magistrate Court Sexual Offence Case No. E025 of 2022 delivered on 18th September 2023)

JUDGMENT

Introduction

1. The appellant being aggrieved by the decision of the trial court that convicted him for the offence of defilement contrary to section 8(1) as read with section 8(2) of the *Sexual Offences Act* Cap 63A has lodged this appeal. He seeks that his conviction be quashed and the 45 years imprisonment sentence set aside.
2. The appeal is premised on the following summarized grounds: that the Learned Judge failed in law and facts, considering that the evidence adduced by the doctor was not enough to base a conviction; considering that the first report of the complainant was doubtful according to other witnesses testimonies; in convicting him basing on witnesses' evidence which was fully contradictory; failing to give due consideration on the plausible defence; and in relying on prosecution evidence that was riddled with contradictions and discrepancies leading to selective judgment.

B. Background

3. Before the trial court, the appellant was charged with the offence of defilement contrary to section 8(1) as read with Section 8 (2) of the *Sexual Offences Act*. The particulars of the offence were that on the diverse dates between 15th April 2022 and 11th May 2022 at [Particulars Withheld], Kaathi Sub-



location, Kimutwa location in Kalama Sub-county within Machakos County, he intentionally and unlawfully caused his penis to penetrate the vagina of E.M.K, a child aged 5 years. In the alternative, he was charged with the offence of committing an indecent act with a child contrary to section 11(1) of the *Sexual Offences Act* No. 3 of 2006. The particulars of the offence were that on diverse dates between 15th April 2022 and 11th May 2022 at [Particulars Withheld] Kaathi sub-location, Kimutwa location in Kalama sub-county within Machakos County, he intentionally and unlawfully touched the vagina of E.M.K., a child aged 5 years with his penis.

case, the prosecution called 5 witnesses.

C. Prosecution case

5. The victim, PW1, a minor of tender years and a pupil at Kaathi School in PP2, gave unsworn evidence. She stated that she knew the accused person, whom she identified in court as Musyoki Wambua alias Kamulia, a person known to her. PW1 testified that the accused used to come to their homestead and that on one occasion he came in the morning while chasing dogs in the shamba before returning to his home. She further testified that on several occasions, particularly at night, the accused would enter her room by opening the window and approach her while she was asleep. She stated that the accused would remove her clothes as well as his own and subject her to unlawful acts on the bed which caused her pain. She testified that the accused would at times hide under the bed and thereafter leave through the window. PW1 stated that these incidents occurred severally. PW1 further testified that some of the incidents occurred while her mother was present in the house and asleep and that the accused would also go to her mother's room and at times sleep in her mother's room. She stated that she slept in her room, sometimes with her mother. PW1 identified the accused in court as the person who committed the acts complained of.
6. During cross-examination, PW1 stated that she was attending school at the time the incidents occurred. She testified that her mother used to bathe her and that she was taken to hospital, where she was examined and given medication. She stated that she returned from hospital at about 3.00 p.m. and that the doctor informed her that she was unwell. She further stated that the incidents had occurred some time earlier and were not recent. Upon re-examination, she stated that the appellant defiled her on different dates. She stated that she was taken to hospital.
7. The trial court in the proceedings noted that PW1 was so forthright in her answer and narrated without problems.
8. PW2, K Ndunge, testified that she resided at Makakoi and earned a living as a luggage carrier. She stated that she knew the accused person, Musyoki, prior to the incident. PW2 testified that she was the mother of PW1, whom she stated was aged five (5) years at the time. PW2 testified that on 11th May 2022 at about 1.00 a.m., she heard the accused moving around outside her house. She stated that she was able to recognize him as she knew his voice and further noted that he appeared intoxicated. PW2 testified that the accused called out to her and thereafter forcibly broke the door and window of the house. She stated that the accused would on many occasions gain entry into the house through the window including on previous nights. PW2 testified that she slept in the same bed with PW1 and that the accused would come to their bed during the night. She stated that on several occasions, she witnessed the accused subject PW1 to unlawful acts. She testified that the accused would remove his clothes and engage in the acts while PW1 was on the bed. PW2 stated that these incidents occurred on diverse dates.
9. PW2 further testified that on one occasion the accused was confronted by members of the public after an alarm was raised whereupon he was assaulted before being handed over to the police. She stated that



the matter was reported to the police and that statements were recorded. PW2 testified that PW1 was taken for medical examination and treatment following the incidents. PW2 identified PW1 in court as her child. She also identified the accused in court as the perpetrator. PW2 produced medical documents relating to PW1, the P3 Form and the PRC Form which were marked for identification as PMFI1 and PMFI2 respectively.

10. During cross-examination, PW2 stated that the incidents occurred at night and that she would hear dogs barking outside. She testified that she took PW1 to hospital for treatment. She confirmed that PW1 was attending school during the period in question.
11. Upon re-examination, PW2 reiterated that the accused committed the offence on diverse dates. She stated that after the incidents, she would clean the child and allow her to go to school.
12. The trial court observed and noted that PW2 was slow in responding to questions.
13. PW3, HN testified that she was born in 1963 and was not engaged in any employment. She stated that she knew the accused person, Musyoki, as a person she used to see within the locality. PW3 further testified that she knew PW1 whom she stated was her granddaughter and the child of her daughter, K. PW3 testified that on the material night, the accused went to her house and forcefully gained entry by breaking the window and opening the door. She stated that the house was a two roomed house in which she slept in her own room while PW1 slept in the other room with her mother. PW3 testified that upon hearing the window being broken and the door being opened, she went to check and saw the accused inside the house. She screamed and raised an alarm.
14. PW3 testified that she called out for help from her younger sibling, SN, who responded and pursued the accused as he fled through the farm. She stated that although the accused was not apprehended that night, he was arrested the following day after the matter was reported to the local administration. PW3 testified that this was the first incident she personally witnessed, though she later heard PW1 state that it was not the first time the accused had committed the acts.
15. PW3 identified the accused in court as the person she saw in the house on the material night. The court noted the identification of the accused.
16. During cross-examination, PW3 stated that the accused was not arrested on the same night but was apprehended on a later date after she reported the matter. She testified that PW1 was taken to hospital, where she was examined and defilement was confirmed, though she could not initially recall the exact date. She later stated that the child was taken to hospital on 15th May 2022. PW3 further testified that she reported the matter through the Nyumba Kumi system using her brother's phone and that the accused was eventually arrested on a Sunday. She denied knowledge of any coercion of the accused and stated that the matter was handled through the authorities.
17. Upon re-examination, PW3 reiterated that she clearly saw the accused breaking the window and entering the house. She stated that she was able to see him using the light from a lamp that she had lit at the time. PW3 remained firm in her testimony and her identification of the accused as the person who unlawfully entered the house on the material night.
18. PW4, Dr. Jack Nthanga, testified that he is a medical doctor working at Machakos Level 5 Hospital. He testified on behalf of Dr. Mutunga who was unwell at the time of the hearing. He stated that he had worked with Dr. Mutunga for a period of about ten (10) years and was thus familiar with his handwriting and medical records. PW4 testified that Dr. Mutunga examined the complainant, a five (5) year old minor who had a history of defilement. He stated that upon examination, there were no visible external physical injuries on the body. However, examination of the genital area revealed bruising on



- both the labia minora and labia majora. He further testified that the hymen was broken, though the injury was noted not to be fresh.
19. PW4 testified that laboratory investigations were conducted and spermatozoa were detected. He further stated that tests for HIV and syphilis were negative. The complainant was given antibiotics as part of her treatment. PW4 testified that following the examination, a P3 Form and a PRC Form were duly filled. Based on the clinical findings and laboratory results, PW4 stated that the conclusion reached was that defilement had occurred.
 20. PW4 produced the medical documents before court. The P3 Form was produced as PExhibit1 while the PRC Form was produced as PExhibit2.
 21. PW5, No. 256083 PC Felista, testified that she was attached to Konza Police Station and was the investigating officer in the case. She stated that on 15th May 2022 while on duty, she perused the Occurrence Book and noted a report of defilement which she had been minuted to investigate. PW5 testified that the report was made by the complainant, who presented herself at the police station accompanied by the minor victim, the child's mother, grandmother, neighbours and the accused person. She stated that she escorted the complainant, the minor victim, the child's teacher and the mother to Machakos Level 5 Hospital for medical examination and treatment. She testified that a PRC Form was completed the following day. PW5 further testified that upon interviewing the victim in the presence of the relevant adults, the victim narrated that the accused whom she referred to as "Kamulia" would repeatedly come to their home, which was a two roomed house. She stated that the grandmother occupied one room while the mother and the victim slept in the other. According to PW5, the victim stated that the accused would gain entry through the window and subject her to unlawful acts on several occasions. PW5 testified that the victim knew the accused very well as he was a neighbour.
 22. PW5 testified that on the material day, the accused came to the complainant's home and called out the child's mother. The grandmother came out first, saw the accused, and upon being noticed, the accused fled. PW5 stated that the grandmother then reported the matter to the area chief. She further testified that the victim disclosed that the accused had been defiling her over a period of time and that the acts were not a one-off incident. PW5 testified that the accused was subsequently arrested and taken to the police station. Upon interrogation, the accused denied the allegations. PW5 stated that after recording statements from the witnesses, a P3 Form was filled and the accused was charged before court. PW5 further testified that she visited the scene and confirmed that the house was indeed two roomed as described. She stated that the victim was five (5) years old and that an Age Assessment Report dated 17th January 2023 was obtained and produced as PExh3.
 23. During cross-examination PW5 stated that her investigations relied largely on the victim's statement. She testified that the victim did not state that the accused had been beaten to compel her to speak and that she did not witness any assault on the accused. She stated that the accused declined to undergo medical examination. PW5 testified that the victim reported that the incidents occurred between 15th April 2022 and 11th May 2022 and that the victim was taken to hospital on 15th May 2022, with further tests conducted on 16th May 2022. She stated that she did not recover any clothings from the scene and did not take photographs. She confirmed that neighbours responded after screams were raised though the accused had already fled. PW5 further testified that the accused was commonly known in the area as "Kamulia", and that his arrest was effected following a report made through the community elder.
 24. With the testimony of these five witnesses, the prosecution closed its case. Upon consideration, the trial court found that the prosecution had established a prima facie case, whereupon the appellant was placed on his defence. He elected to give sworn evidence and called two other witnesses.



D. Defence case

25. DW1, the appellant, gave sworn testimony in his defence. He testified that he lived with his father in a house comprising five rooms. He denied committing the offence as charged. DW1 testified that on the material day, he received a telephone call from Stephen Mutuku, a person who allegedly owed him money. He stated that upon meeting him, Stephen Mutuku threatened to take him to a place from which he would never get out. DW1 testified that he was thereafter taken to Konza Police Station against his will.
26. DW1 further testified that when he resisted being taken to the police station, Stephen Mutuku allegedly caused police officers to assault him, as a result of which he sustained an injury to his leg. He stated that despite requesting to be taken to hospital for treatment, his request was declined. He further alleged that he suffered while in custody and that he was asked for money.
27. DW2, Patrick Wambua Mbithi of Kimutwa Location, testified that he had known the accused, Francis, since birth and had personally raised him. He stated that he lived in the same house with the accused. He recalled hearing that the accused had been picked from the house but he had never seen the individuals who took him in court. DW2 further stated that the victim was not examined in the presence of the accused and that he himself was not called to testify. He stated that he does not know why these events occurred and stated that he had never seen the complainant nor did he know why his son had been charged.
28. On cross-examination, DW2 confirmed that the accused was his first-born son. He maintained that he did not know what had transpired regarding the charges and remained unaware of the circumstances up to the present day.
29. DW3, Lucia Wavinya Wambua of Kalama, Makutui, testified that she is the mother of the accused and lives with him. She stated that she had never observed any problem with her son and was surprised by the allegations that he had defiled a child. She explained that the accused normally returned home at 8:30 p.m., and she was the one who opened the door for him. She further stated that on the day of the alleged incident, the accused was unwell and sleeping in the house.
30. On cross-examination, DW3 confirmed that she was the mother of the accused. She admitted that she did not know the circumstances of the alleged incident and had only heard about it from other people. She also acknowledged that she had no medical evidence to support her claim that the accused was unwell and had not taken him to hospital.
31. After the close of the defence case, the trial court considered the totality of the evidence on record and found that the prosecution had proved its case as against the appellant. He was found guilty as charged and convicted of the offence of defilement.
32. On sentencing the trial court noted that the accused ought to have been a guardian and protector of the 5 year old victim. That he took advantage of her innocence without any mercy and that the accused does not deserve leniency. The court sentenced the appellant to serve 45 years in prison effective from the date of remand.

E. The Appeal

33. The appeal is as set out in the earlier paragraphs of this judgment. The appellant seeks that his conviction be quashed and the 45 years imprisonment sentence set aside.



34. The appeal was heard by way of submissions with each of the parties filing their respective submissions. The parties' submissions are as follows:

Appellant's Submissions

35. The appellant, through amended grounds and written submissions, challenged both the conviction and sentence imposed by the trial court. He submitted that the trial court erred in law by failing to ensure that the charge against him was proved to the required standard. Specifically, he argued that the evidence of the prosecution witnesses, particularly the minor complainant, was not properly evaluated. The appellant contended that the minor's identification of him was unreliable, given that the alleged incident occurred at night and the trial court did not clarify whether conditions allowed proper identification. He further submitted that the medical evidence confirming defilement did not establish that he was the perpetrator.
36. The appellant also challenged the sentence of forty-five (45) years imprisonment as manifestly excessive. He relied on the jurisprudence in *Ali Abdullah Mwanza v Republic*, Criminal Appeal No. 259 of 2012, which emphasized that term sentences should not exceed the normal life expectancy of an accused. He argued that, given his age of thirty (30) years at the time of sentencing, a 45 years imprisonment term would extend beyond his expected lifespan thereby undermining his opportunity for rehabilitation. He further contended that the sentence violated his constitutional rights under Articles 25(a), 28 and 29(f) of *the Constitution* and that International Human Rights Principles, including those in the European Convention on Human Rights as interpreted in *T.P. and A.T. v Hungary* (2016), support his claim that the sentence was disproportionate and inhumane.
37. In addition, the appellant submitted that the trial court failed to accord him his right to legal representation under Article 50(2)(h) of *the Constitution* and Section 43(1) of the *Legal Aid Act*. He argued that he was not informed of his right to have an advocate assigned to him and as a layperson, he was unable to effectively conduct his own defence. He cited several authorities including *Meshack Juma Wafula v Republic* (2019), *Z.W.O v Republic* (2019), *Karisa Chengo & 2 Others v Republic* (2017) and *Evans Wanjala Siibi v Republic* (Court of Appeal No. 314 of 2018), to demonstrate that the failure to provide legal representation in complex cases with severe sentences constitutes substantial injustice, rendering the trial null and void.
38. Finally, the appellant emphasized the principles of sentencing, including deterrence, incapacitation and rehabilitation, submitting that as a first offender, he should have been afforded the opportunity for rehabilitation and reintegration into society. He urged the Court to quash the conviction, set aside the sentence and release him asserting that the trial court's errors amounted to a violation of his constitutional and human rights.

Respondent's Submissions

39. The respondent opposed the appeal. Counsel for the respondent submitted that the prosecution had called five witnesses while the accused called two witnesses and that the trial court correctly evaluated the evidence and arrived at its conclusion.
40. In response to the appellant's grounds, the respondent urged that the trial court correctly considered the evidence relating to the essential ingredients of the offence, that is, proof of the victim's age, proof of penetration or indecent act and identification of the perpetrator. While making reference to the case of *Emmanuel Kileiva versus Republic* [2020] KEHC 623 (KLR), the respondent emphasized that the age of the complainant was sufficiently established through the testimony of her mother and an age



assessment report (PEXh3) prepared eight months after the alleged offence. The respondent submitted that the timing of the report did not affect its reliability or probative value.

41. Regarding penetration, the respondent relied on the testimonies of the minor complainant (PW1), her mother (PW2), and PW4, who corroborated the medical findings of bruising and a broken hymen. It was further submitted that the appellant took advantage of the mother's sickness to commit the offence repeatedly over a period of time.
42. On identification, the respondent submitted that the complainant was familiar with the appellant and clearly identified him as the person who defiled her. That the appellant was well known to the household and the testimonies of PW1, PW2, and PW3 consistently described the appellant's repeated intrusions and actions, confirming that he was correctly identified.
43. The respondent concluded that the prosecution had proved the case beyond reasonable doubt and urged the court to dismiss the appeal and uphold the decision of the trial court.

F. Analysis and determination

44. This being a first appeal, this Court has a duty to reconsider and re-evaluate the evidence adduced before the trial court and make its own independent conclusion. It should however give regard to the fact that it has neither heard nor seen the witnesses testify. See the cases of *Pandya v R* [1957] EA 336; *Ruwalla v R* [1957] EA 570 and *Kisumu Criminal Appeal No. 28 of 2009 David Njuguna Wairimu v. Republic* [2010] eKLR where the Court of Appeal held that:

“the duty of the first appellate court is to analyse and re-evaluate the evidence which was before the trial court and itself come to its own conclusion on that evidence without overlooking the conclusion of the trial court. There are instances where the first appellate court may depending on the facts and circumstances of the case, come to the same conclusion as those of the lower court. It may rehash those conclusions. We do not think there is anything objectionable in doing so, provided it is clear that the court has considered the evidence on the basis of the law and the evidence to satisfy itself on the correctness of the decisions.”

45. Having considered the record of appeal as well as the submissions by parties, I discern the following issues for determination:-
 - a. Whether the offence of defilement was proved;
 - b. Whether the defence was properly considered; and
 - c. Whether the sentence was harsh.

Whether the offence of defilement was proved

46. Section 8(1) of the *Sexual Offences Act* provides that “a person who commits an act which causes penetration with a child is guilty of an offence termed defilement”. While Section 8 (2) of the *Sexual Offences Act* provides that “A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life.”
47. In the case of *George Opondo Olunga v Republic* (2016) eKLR the ingredients for the offence of defilement were set out as:
 - a. Proof of the age of the victim;



- b. Proof of penetration or indecent act;
 - c. Identification of the perpetrator.
48. On the issue of age, PW2, the complainant's mother, testified that PW1 was five (5) years old at the time of the offence. This evidence was corroborated by an age assessment report dated 17th January 2023, which estimated the complainant's age at about six (6) years. Although the appellant questioned the timing of the age assessment, the delay does not diminish its probative value. What matters is whether the age was established to the satisfaction of the court.
49. Upon re-evaluation, this Court is satisfied that the complainant was a child of tender years within the meaning of the *Sexual Offences Act* and that her age was proved beyond reasonable doubt.
50. On proof of penetration, penetration is defined under section 2 of the *Sexual Offences Act* as the partial or complete insertion of the genital organ of a person into the genital organs of another. PW1 gave a consistent account of how the appellant undressed her and subjected her to sexual acts that caused her pain. Her testimony was corroborated by PW2, who testified that she witnessed the appellant defiling the complainant on several occasions. Medical evidence tendered through PW4 further confirmed the presence of bruises on the labia minora and majora and a broken hymen, findings consistent with repeated sexual penetration. Although the hymenal injury was noted not to be fresh, the evidence clearly pointed to repeated acts over a period of time, as alleged in the charge. This Court finds that penetration was proved beyond reasonable doubt.
51. On identification of the perpetrator, the appellant challenged his conviction on the basis that identification was not proved, contending that the incidents allegedly occurred at night and that conditions for identification were not favourable.
52. This argument is not persuasive. The evidence on record demonstrates that this was a case of recognition rather than identification of a stranger. The complainant knew the appellant well, referred to him by name and nickname, and stated that he was a frequent visitor to their home. PW2 and PW3 equally knew the appellant as a neighbour. Recognition is more reliable than identification of a stranger as held in *Anjononi & Others v Republic* [1980] KLR 59.
53. Further, PW3 testified that she saw the appellant inside the house on the material night using lamp light. PW5 confirmed that the appellant was well known in the locality and that his arrest followed a report through community structures. The totality of the evidence leaves no reasonable doubt as to the identity of the perpetrator.
54. Accordingly, this Court finds that the appellant was positively and correctly identified through recognition as the person who committed the offence.

Whether the defence was properly considered

55. The appellant's defence consisted mainly of a denial and allegations of a frame-up. DW2 and DW3, his parents, testified that they did not know why the appellant had been charged and asserted that he was at home during the material period. The trial court in considering the defence stated that, "the evidence by the accused that he was called to collect his debt where he was informed of this incident and warned of dire consequences by the debtor is an afterthought. He did not raise the issue during the cross examination of key witness and he does not say who the said Stephen Muliki who allegedly called him for his debt is related to the complainant or this matter. His evidence was not convincing at all."
56. A trial court is obligated to consider the defence, but it is not required to accept it if it does not raise reasonable doubt. The defence witnesses admitted that they had no direct knowledge of the events



forming the subject of the charge. Their testimony was largely speculative and based on belief rather than fact.

57. This court finds that the trial court properly considered the defence and correctly concluded that it did not displace the strong and consistent prosecution evidence.

Whether the sentence was harsh

58. The appellant was sentenced to forty-five (45) years' imprisonments. Section 8(2) of the Sexual Offences Act prescribes a mandatory sentence of life imprisonment where the victim is aged eleven years or below. In Republic v Mwangi; Initiative for Strategic Litigation in Africa (ISLA) & 3 others (Amicus Curiae) the Supreme Court reaffirmed the legality of the mandatory minimum sentences in the Sexual Offences Act holding that for as long as section 8 of the Sexual Offences Act remain valid, the various mandatory minimum sentences therein remain lawful. Consequently, by law, a person convicted of defilement under section 8(2) of the Sexual Offences Act ought to be sentenced to the mandatory life imprisonment. Any term sentence will be unconstitutional.

59. While the appellant argued that the sentence was excessive and violated constitutional principles on dignity and life expectancy, I note that the sentence imposed was a term sentence of 45 years imprisonment, which is fundamentally lower than the mandatory life sentence. Suffices it to state that it was a more lenient sentence than the mandatory sentence prescribed by statute.

60. The question that follows is what this appellate court should do. Ordinarily, this court ought to correct such an irregularity by imposing the statutory prescribed sentence. However, in this case, such an act will amount to an enhancement of the sentence from 45 years imprisonment to life sentence. For such enhancement, it is trite law that the appellant ought to have been given prior notice of enhancement. No notice was given to the appellant. Accordingly, this court finds no basis for interfering with the sentence.

61. Based on the above, the appeal therefore lacks merit and is dismissed in its entirety.

Orders accordingly.

DATED, SIGNED AND DELIVERED AT MACHAKOS THIS 12TH DAY OF FEBRUARY, 2026

RHODA RUTTO

JUDGE

In the presence of;

.....Appellant

.....Respondent

Selina Court Assistant

